IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-1118

MARY L. JOHNSON, Administratrix *ad Prosequendum* and General Administratrix of the Estate of LEROY JOHNSON, Deceased, and LORETTA JOHNSON, Administratrix *ad Prosequendum* and General Administratrix of the Estate of HERBERT D. JOHNSON, Deceased,

Petitioners,

vs.

ATLANTIC CITY ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ATLANTIC CITY ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States;

Petitioners, Mary L. Johnson, Administratrix ad Prosequendum and General Administratrix of the Estate of Leroy Johnson, Deceased, and Loretta Johnson, Administratrix ad Prosequendum and General Administratrix of

the Estate of Herbert D. Johnson, Deceased, respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on November 23, 1976, reversing the Order allowing plaintiffs to amend their complaint to include third-party defendant, Atlantic City Electric Company, as an original party defendant of the U.S. District Court for the District of New Jersey, in favor of petitioners and against respondent, Atlantic City Electric Company.

Opinion Below

The *Per Curiam* Opinion of the United States Court of Appeals for the Third Circuit is attached hereto as part of the Appendix and is as yet unreported. (Appendix A, p. 1a). The Opinion of the United States District Court for the District of New Jersey is attached hereto as part of the Appendix and is unreported. (Appendix C, p. 5a).

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit reversing the Judgment of the United States District Court for the District of New Jersey was entered on November 23, 1976, and is printed infra. (Appendix B, p. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether a District Court, in a diversity case, has the discretionary power to invoke ancillary or pendent jurisdiction to permit plaintiffs to assert a state law claim

against a third-party defendant when plaintiffs and the third-party defendant are citizens of the same state, when the finder of fact must apportion lability and damages arising from the combined acts of parties.

Constitutional Provisions, Statutes and Rules of Court Involved

Constitution of the United States, Article 3, Section 2; U.S.C.A., Article 3 to 7, Constitution, Pg. 209

The Constitution of the United States, Article 3, Section 2, Clause 1, prescribes the jurisdiction of courts and provides:

> "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority • • • between Citizens of different States."

United States Code, Title 28, Section 1332(a).

Title 28 of the U.S. Code, Section 1332(a) prescribes that:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

Federal Rule of Civil Procedure 14(a).

"(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person called the third-party defendant shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13."

The balance of the rule is not applicable.

New Jersey Statutes Annotated:

N.J.S.A. 2A:15-5.1 provides:

"2A:15-5.1 Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

2A:15-5.2 In all negligence actions in which the question of liability is in dispute, the trier of fact shall make the following as findings of fact:

a. The amount of damages which would be recoverable by the injured party regardless of any considerations of negligence, that is, the full value of the injured party's damages;

b. The extent, in the form of a percentage, of each parties' negligence. The percentage of negligence of each party shall be based on 100% and the total of all percentages of negligence of all the parties to a suit shall be 100%.

c. The judge shall mold the judgment from the finding of fact made by the trier of fact.

2A:15-5.3 The party so recovering, may recover the full amount of the molded verdict from any party against whom such recovering party is not barred from recovery. Any party who is so compelled to pay more than such party's percentage share may seek contribution from the other joint tortfeasors."

New Jersey Statutes Annotated, Title 2A:15-5.1, Pocket Part, Pgs. 12 and 13.

Statement of the Case

This action arises as a result of an electrocution accident which occurred on October 5, 1973, when plaintiffs' decedents, Leroy and Herbert D. Johnson, were contractors engaged to work on the roof of the tenant house of the defendant-third-party plaintiff, Better Materials Corporation (hereinafter "Better Materials") in Fairfield Township, New Jersey. The plaintiffs are residents of New Jersey. The defendant, Better Materials, is a Pennsylvania corporation. The property on which the electrocution occurred is a 400 acre plus historical farm complex which was, at the time of the accident, in the course of renovation. The property in question was built at a time contemporaneous with or prior to Benjamin Franklin's discovery of electricity. The accident occurred when a ladder being lowered from the side of the multi-story premises came in contact with a high tension wire. Leroy Johnson was electrocuted and killed. Herbert Johnson sustained injuries which led to his ultimate demise on April 30, 1974. The accident occurred on the property of Better Materials and over a quarter of a mile from the main lines of the third-party defendant, Atlantic City Electric Company (hereinafter "Atlantic City Electric"), a New Jersey corporation, where Atlantic City Electric normally transmits its power.

Plaintiffs filed suit in the United States District Court for the District of New Jersey against Better Materials in July of 1974. Better Materials thereafter, pursuant to leave granted, filed and served a third-party complaint for contribution and indemnity. Thereafter, Atlantic City Electric filed an Answer. Discovery by way of exchange of interrogatories proceeded. In July of 1975, answers to interrogatories were received from Atlantic City Electric and depositions held, at which it was discovered that the

lines which caused the electrocution of plaintiffs' decedents were not the interior lines of Better Materials, but the transmission lines of Atlantic City Electric, and plaintiffs thereafter forthwith moved for leave to file an amended complaint seeking to join the third-party defendant, Atlantic City Electric, as an original party defendant. Said motion was heard and granted on October 3, 1975, on which date plaintiffs filed their amended complaint. In so granting the plaintiffs' motion, the Honorable Mitchell H. Cohen, Senior Judge of the United States District Court for the District of New Jersey, in his oral conclusions stated:

> "The Court: All right, gentlemen, I have reviewed the file and read your brief and listened very carefully to the oral arguments made. It's a very interesting, technical question, issue, and perhaps worthy of some elucidation by the Court of Appeals at sometime.
>
> "There isn't any precedent in this district on this very issue.
>
> "Mr. Franklin: Your Honor, I'm sorry to interrupt you, I do have two Third Circuit—
>
> "The Court: No, I'm talking about this district. I'm mindful of the cases that you cited in support of the positions that each of you have taken, but in reaching my decision, I'm more influenced by the interest of justice, by judicial economy, by the fact that this is the 3rd of October and on the 5th of October, which falls on a Sunday, the Statute of Limitations will run, and bearing in mind those principles or feelings, I think it would be much better housekeeping to dispose of this entire case in one setting. This case has now been pending here for fifteen months, and even if, through some miraculous effort, the plaintiff was able to prepare

and file a claim on Monday, which would be probably the last day, since the 5th of October falls on a Sunday, he would be starting out fresh. The State backlog is almost as bad as the backlog here, perhaps on a par. I don't know, but there would be fifteen months lost. It is a serious case, it's an electrocution case a death case, and I am prompted by the interest of justice in disposing of all the cases in one setting before one court, before one Judge, before one jury.

"Accordingly, the application for leave to join the third party defendant as an original party will be granted and counsel for the plaintiff may submit the appropriate order."

Thereafter, Atlantic City Electric sought and successfully received leave to file an interlocutory appeal pursuant to 28 U.S.C. §1292(b).

After exhaustive briefing, the Third Circuit Court of Appeals requested oral argument and further amplification from counsel on questions raised by this court's decision in the case of *Aldinger* v. *Howard*, —— U.S. —— (1976). The matter was argued on September 14, 1976, and thereafter on November 23, 1976, the Third Circuit Court of Appeals, in a *Per Curiam* two sentence opinion, reversed, without stating any grounds. The action before the United States District Court for the Southern District of New Jersey is still pending and has not yet been reached for trial (Appendix C, p. 5a).

There is no evidence nor has there been any allegation that any collusion existed between the plaintiffs and the defendant-third-party plaintiff, Better Materials, nor that any of the parties have acted other than in good faith. Atlantic City Electric has not claimed the District Court abused its discretion, but has only attacked its power to exercise the same.

REASONS FOR GRANTING THE WRIT

POINT I

A split of authority among Circuits of the Court of Appeals of the United States exists as to whether the District Courts have the power to invoke ancillary jurisdiction in a state law claim to permit a plaintiff to assert the same against a non-diverse, already existing party to the action, a third-party defendant, pursuant to Federal Rule of Civil Procedure 14(a), which split should be resolved by this Honorable Court.

In its conclusional decision, the Third Circuit Court of Appeals determined that District Courts in the Third Circuit lack the power to elevate an already existing non-diverse third-party defendant in the action to the status of an original party defendant on the basis of two precedents in the Circuit, e.g., *Rosario* v. *American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227 (3rd Cir. 1976) and *Patton* v. *Baltimore & O.R. Co.*, 197 F.2d 732 (3rd Cir. 1952). It is noted that in the case of *Rosario* v. *American Export-Isbrandtsen Lines, Inc.*, the Third Circuit dealt with the question at bar at footnote 17, 531 F.2d at page 1233, in the following fashion:

> "• • • The question whether a direct claim by a plaintiff against a third-party defendant under rule 14(a) is within the ancillary jurisdiction of the federal courts was not briefed or argued before this court on appeal although the district court was apparently presented with this contention and rejected it. • • •"

The case of *Patton* v. *Baltimore & O.R. Co., supra*, precedes by almost a decade and a half the landmark opinion

of this Court dealing with the subject matter here. Cases decided subsequent to *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), along with the text writers which have explored the field, have indicated that the: "[C]ases antedating *United Mine Workers* v. *Gibbs* that denied judicial power, i.e., jurisdiction, over the pendent claim are suspect as authority." *Astor-Honor, Inc.* v. *Grossett & Dunlap, Inc.,* 441 F.2d 627, 629 (2nd Cir. 1971); 3A *Moore, Federal Practice,* Par. 18.07 [1.-4] (1970).

The Third Circuit Court of Appeals in deciding this important issue has adopted an inflexible rule of general application. The same is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit, *Saalfrank* v. *O'Daniel* v. *Parkview Memorial Hospital, Inc.,* 533 F.2d 325 (1976). In that case, the Sixth Circuit was faced with the identical question and concluded:

> "Since the Supreme Court has not spoken on this important jurisdictional question, we are not disposed to adopt an inflexible rule of general application. However, we have no hesitancy in concluding that the District Court abused its discretion in permitting Saalfrank to recover from Parkview in the present case." 533 F.2d at Pg. 330.

The case at bar is peculiarly well suited for the grant of a writ of certiorari inasmuch as it is uncomplicated by any side issues and will permit the court to resolve finally an important question of serious practical impact in the management of diversity cases pending in the federal trial courts. The case at bar is not of that category of cases where plaintiffs initially seek recovery against a multitude of defendants, not all of which meet the test of diversity of citizenship. The Court will have the opportunity to deal with the single issue of whether the

trial judges in our federal system should be permitted discretion to manage actions before them so as to permit them sufficient flexibility in the interests of the efficient administration of justice to deal with a whole case.

This action presents a question related to the issue considered in *Aldinger* v. *Howard, supra,* which opinion deals with this aspect of ancillary or pendent jurisdiction, but which expressly left the issue unresolved, and which restricted its decision to Section 1983 of the Civil Rights Act, as included within the jurisdictional grant of 28 U.S.C. §1343(3). It appears from a reading of *Aldinger* that whether the doctrine of ancillary or pendent jurisdiction extends to confer jurisdiction over a party as to whom no independent basis of federal jurisdiction exists in a diversity case, continues unresolved. Mr. Justice Rehnquist concluded the majority opinion in *Aldinger* by noting:

> "We decide here only the issue of so-called 'pendent party' jurisdiction with respect to a claim brought under §1343(3) in §1983."

In so isolating the issue, he noted that the Court believed:

> "[T]hat it would be as unwise as it would be unnecessary to lay down any sweeping pronouncement upon the existence or exercise of such jurisdiction."

and concluded with two observations:

> "If the new party sought to be impleaded is not otherwise subject to federal jurisdiction, there is a more serious obstacle to the exercise of pendent jurisdiction than if parties already before the court are required to litigate a state law claim. Before

it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." —— US ——, 49 L Ed 2d 276, at pg. 289.

Before arriving at its conclusion in *Aldinger*, the Court acknowledged the Circuit Court's opinion, which it affirmed, that diversity cases generally present more attractive opportunities for exercise of pendent party jurisdiction since all claims therein by definition arise from state law. It would thus appear that the case at bar is that type of action which most directly justifies the invocation of pendent or ancillary jurisdiction.

To a great extent the confusion in the area resulting from diverse opinions of the circuits on the power of the courts to exercise jurisdiction in state law claims, went unresolved by the statement in *Aldinger*:

> "We think it quite unnecessary to formulate a general, all-encompassing jurisdictional rule. Given the complexities of the many manifestations of federal jurisdiction, together with countless factual permutations possible under the Federal Rules, there is little profit in attempting to decide, for example, whether there are any 'principal' differences between pendent and ancillary jurisdiction, or, if there were, what effect *Gibbs* had on such differences."

Plaintiffs in the case at bar are not introducing a new party into the litigation. They merely seek to make full circle of those issues and claims which will be ultimately tried in the already existing suit.

In arriving at its denial of judicial discretion, the Third Circuit Court of Appeals seriously eroded its earlier decisions in *Borror* v. *Sharon Steel Company*, 327 F.2d 165 (3rd Cir. 1964) and *Jacobson* v. *Atlantic City Hospital*, 392 F.2d 149 (3rd Cir. 1968). In *Jacobson*, the late Chief Judge Hastie recognized the applicability of ancillary jurisdiction in a case where a Pennsylvania plaintiff had instituted a negligence action for medical malpractice against two New Jersey physicians and a New Jersey hospital. Under New Jersey law, the hospital's liability could not exceed $10,000.00. When the hospital moved to dismiss the complaint against it on the ground that the requisite jurisdictional amount was lacking, the District Court granted the hospital's motion, but the Court of Appeals reversed and sustained federal court jurisdiction, relying upon *United Mine Workers* v. *Gibbs*, *supra*, which it interpreted as holding that a federal court could consider a claim based purely on state law absent jurisdictional amount if the state claim grew out of the same operative facts as the claim which invoked jurisdiction. In *Borror, supra*, Chief Judge Biggs, in anticipation of and with obvious insight into the field of judicial administration, foresaw the result shortly thereafter achieved in the unanimous opinion of this Court written by Mr. Justice Brennan in *Gibbs* dealing with the doctrine in question. The Third Circuit there noted that while a survival action was not a federal action and that there was no basis for any federal claim and that the action was exclusively one of diversity, applied the doctrine of pendency first enunciated in *Hurn* v. *Oursler*, 289 U.S. 238 (1933) [and expanded by *Gibbs*] by noting:

> "To apply the *Hurn* v. *Oursler*, 289 U.S. 238 (1933) principle of pendency where diversity of citizenship rather than a federal question is the basis of jurisdiction is an extension, but one which we

think is desirable and should be countenanced by law." 327 F.2d at pg. 174.

The Court in *Gibbs* stated:

> "While it is commonplace that the Federal Rules of Civil Procedure do not expand the jurisdiction of federal courts, they do embody 'the whole tendency of our decisions . . . to *require* a plaintiff to try his . . . whole case at one time'". 383 U.S. 725 (Emphasis supplied.)

It is apparent that wide conflict exists in the numerous District Courts. Many permit the exercise of ancillary or pendent jurisdiction in cases like that at bar. *Sklar* v. *Hayes,* 1 F.R.D. 594 (E.D.Pa. 1941); *Myer* v. *Lyford,* 2 F.R.D. 507 (M.D.Pa. 1942); *Olson* v. *United States of America* v. *Frenchman-Cambridge,* 38 F.R.D. 489 (Neb. 1965); *Buresch* v. *American LaFrance,* 290 F.Supp. 265 (W.D.Pa. 1968); *Davis* v. *United States* 350 F.Supp. 206 (E.D.Mich. 1972); *Wittersheim* v. *General Transportation Services, Inc.,* 378 F.Supp. 762 (E.D.Va. Richm.Div. 1974); *Fawvor* v. *Texaco, Inc.,* 387 F.Supp. 626 (E.D. Tex. 1975); *Gravitt* v. *Southwestern Bell Telephone Company,* 396 F.Supp. 948 (W.D.Tex. 1975); *Saalfrank* v. *O'Daniel* v. *Parkview Memorial Hospital, Inc.,* 390 F.Supp. 45 (N.D.Ohio 1975), reversed 533 F.2d 325 (6th Cir. 1976); *CCF Industrial Park, Inc.* v. *Hastings Industries, Inc.,* 392 F.Supp. 1259 (E.D.Pa. 1975); *Morgan* v. *Serro Travel Trailer Co., Inc.* v. *Ray Mitchell,* 69 F.R.D. 697 (Kansas 1975). Others require an independent basis for jurisdiction against a third-party defendant. *Joseph, et al.* v. *Chrysler Corp., et al.,* 61 F.R.D. 347 (W.D.Pa. 1973); *Mickelic* v. *United States Postal Service,* 367 F.Supp. 1036 (W.D.Pa. 1973); *Ayoub* v. *Helm's Express, Inc.,* 300 F.Supp. 473 (W.D.Pa. 1969).

The decision of the Circuit Court in this case would similarly appear to be in conflict with many decisions in state law claims decided shortly prior to *Gibbs*: *Great Lakes Rubber Corp.* v. *Herbert Cooper Co.,* 286 F.2d 631 (3rd Cir. 1961); *Pennsylvania Railroad Co.* v. *Erie Avenue Warehouse Co.,* 302 F.2d 843 (3rd Cir. 1962); *Borror* v. *Sharon Steel Company,* 327 F.2d 165 (3rd Cir. 1964), and after *Gibbs, Wilson* v. *American Chain & Cable Company,* 364 F.2d 558 (3rd Cir. 1966); *Jacobson* v. *Atlantic City Hospital,* 392 F.2d 149 (3rd Cir. 1968); *Revere Copper & Brass Inc.* v. *Aetna Casualty & Surety Co.,* 426 F.2d 709 (5th Cir. 1970); *Schwab* v. *Erie Lackawanna Railroad Co.* v. *Sauers,* 48 F.R.D. 442 (W.D.Pa. 1970), reversed 438 F.2d 62 (3rd Cir. 1971); *Nelson* v. *Keefer,* 451 F.2d 289 (3rd Cir. 1971).

Petitioners recognize two factually inapposite opinions of the Fourth Circuit Court of Appeals. *Kenrose Manufacturing* v. *Whitake* v. *Kilodyne,* 53 F.R.D. 491 (W.D. Va. 1971), affd. 512 F.2d 890 (1972) and *Parker* v. *Moore,* 538 F.2d 764 (4th Cir. 1975). In the former, the Circuit Court affirmed a lower court opinion which denied plaintiff's motion to join a third-party defendant as an original party defendant wherein the defendant-third-party plaintiff had previously dismissed its claim against the third-party defendant, thereby eliminating the basis for allowing a direct complaint by plaintiff against the third-party defendant. The trial court noted that the third-party complaint was the only foundation upon which the plaintiff could support his claim, and the Circuit Court recognized that as a result of the third-party plaintiff's dismissal of the third-party complaint, "any basis for the exercise of ancillary jurisdiction completely evaporated." *Kenrose, supra,* 512 F.2d at pg. 895.

In *Parker,* the Circuit Court recognized that the complaint and proposed amended complaint contained conclu-

sional allegations that both the defendant-third-party plaintiff and third-party defendant were negligent in the sale and installation of an elevator and violated implied warranties, while the factual structure of the claim from the inception revealed that the plaintiff's primary claim was really against the non-diverse installer dealer-third-party defendant for improper grounding and not against the manufacturer. 538 F.2d at pg. 766.

In the case at bar, the primary liability is on the property owner, Better Materials, who had the duty to provide the plaintiffs' decedents with a safe place to perform their work, to inspect for and discover dangerous conditions and either rectify the same or warn of their existence. Better Materials' claims over against Atlantic City Electric are based on the electric company's failure to warn that it had installed a 7000 volt transmission line immediately next to the tenant house where plaintiffs' decedents were working. Clearly, both Better Materials and Atlantic City Electric knew or should have known of the hazard, latent as it was, and far away from public roads and the usual place for electric transmission lines, and failed to inspect, discover, protect or warn of the dangers.

POINT II

The holding of the Court of Appeals violates and is in direct conflict with Rule 14(a) of the Federal Rules of Civil Procedure.

The ruling of the Third Circuit Court of Appeals effectively eliminates an important section of Rule 14(a) as an effective tool of judicial administration. The Federal Rules of Civil Procedure were drafted for the purpose of modernizing the field of the administration of justice and to increase the efficiency of our judicial system. Those

rules, since their inception, have been reviewed and amended from time to time in order to recognize legislative changes affecting the procedural aspect of civil practice. While the Rules do not confer jurisdiction, once attached, they are intended to introduce in the area of civil procedure considerations of fairness, convenience and economy in order to entitle persons to maintain their causes of action. While Rule 82 provides that, "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts * * *.", it is clear from Justice Rehnquist's historical analysis in *Aldinger, supra,* that the doctrine herein under consideration long preceded the adoption of the Federal Rules of Civil Procedure. An elimination of the pertinent provision of Rule 14(a) or ignoring its vitality would appear to emphasize form over substance.

The applicable portion of Rule 14(a) provides that:

> "The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13."

It is noted that the rule was so redrafted in 1948 with the obvious intention of encompassing cases dealing with actions for contribution at a time when the Uniform Joint Tortfeasors Contribution Act, or its facsimile, was being adopted in most states. The notes of the Advisory Committee on the rules which made the change note that the rule was:

> "Revised to make clear that the plaintiff may, if he desires, assert directly against the third-party

> defendant either by amendment or by new pleading, any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff." 28 U.S.C.A., Rule 14 at Pg. 409.

If the adoption of these rules was intended to in any way streamline the judicial process and to serve as a model for the states, the abbreviated ruling by the Third Circuit herein serves only to resuscitate long dead ancient doctrines like those enunciated with equal bervity and lack of rationale as in *Strawbridge* v. *Curtiss,* 7 U.S. 266 (1806). Such rulings seek only to encourage the shifting of judicial burdens from the federal system to the states and to discourage citizens from exercising their constitutional right, in diversity cases, to sue in the federal courts.

Not only does the decision of the Third Circuit fly in the face of the cited portions of Rule 14(a), but the same is in direct contradiction with the views universally endorsed by every responsible commentator and architect in the field of federal procedure and judicial administration. See: Holtzoff, "Entry of Additional Parties in a Civil Action", 31 F.R.D. 101 (1962); Fraser, "Ancillary Jurisdiction and the Joinder of Claims in the Federal Court", 33 F.R.D. 27 (1964); Baker, "Toward a Relaxed View of Federal Ancillary Pendent Jurisdiction", 33 U. Pitt.L.Rev. 759 (1972); Moore, 3 *Moore, Federal Practice,* Para. 14.27 [2], Pg. 726 (1974); 6 *Wright & Miller, Federal Practice & Procedure,* Sec. 1444 at Pgs. 231-232.

Denying the trial court the power to exercise discretion is a giant step backward in the field of judicial administration. At a time when the courts and the profession are under constant pressure to modernize the delivery of legal and judicial services, the Court arrives at a ruling which will have no effect other than to complicate, pro-

long, elongate, confuse and increase the cost of the judicial process. The action pending in the District Court shall continue. The matter will have to be tried. The trial judge will be faced with difficult questions arising as a result of the comparative negligence statute, N.J.S.A. 2A:15-5.1, *supra,* without having the capacity to manage the whole case. The parties and the facts are already before the Court. The burden on the District Court is in no way increased by holding that the plaintiffs' claim against the third-party defendant is ancillary. To the contrary, the ability of the trial court to manage and attempt to settle the litigation is impaired.

The denial of the petitioners' rights to litigate all issues once and to subject them, as Atlantic City Electric advocates, to an incomplete trial in the federal court and a subsequent second trial in the state court, is an interpretion clearly limiting the District Court's jurisdiction. Petitioners admittedly filed an eleventh hour action on the eve of the tolling of the Statute of Limitations in the state court in order to protect their claims against the third-party defendant, Atlantic City Electric, in the event of a reversal. The District Court, *supra,* Statement of Fact, noted that the state backlog was as bad as the federal backlog. In fact, the state backlog is worse. Professor Moore deals with the issue eloquently in his treatise in noting:

> "The answer to this argument is that under cooperative federalism the federal courts have a higher duty to end all court congestion, not just that in the federal courts. If federal courts refuse to use conceptual tools to dispose of all related claims with the greatest economy and convenience, the federal courts then add to the total ineconomy and inconvenience which litigants must suffer to obtain justice on the merits of their claims." Moore, at Pg. 14-572.

CONCLUSION

The split of authority that exists among the various circuits of the Court of Appeals of the United States and within the Third Circuit itself as to the scope of ancillary jurisdiction of the federal courts to adjudicate state law claims asserted by plaintiffs directly against third-party defendants in compliance with Federal Rule of Civil Procedure 14(a) must be resolved by this Honorable Court. The Sixth Circuit in *Saalfrank, supra,* has recognized that the Supreme Court has not spoken out on this important jurisdictional question and refused to adopt an inflexible rule of general application denying the District Courts power to exercise discretion in granting ancillary jurisdiction. The Third Circuit has adopted an inflexible rule denying the District Courts that power. This split requires resolution. The recent trend of federal authority appearing to enlarge the scope of ancillary jurisdiction in the federal courts requires definition, which can only be accomplished by granting this Petition for Writ of Certiorari.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX A

Per Curiam Opinion of the United States Court of Appeals for the Third Circuit

(Filed—November 23, 1976)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1185

MARY L. JOHNSON, Administratix ad Prosequendum and General Administratrix of the Estate of LEROY JOHNSON, deceased and LORETTA JOHNSON, Administratrix ad Prosequendum and General Administratrix of the Estate of HERBERT D. JOHNSON, deceased

v.

BETTER MATERIALS CORPORATION (Deft., 3d-party plaintiff in D. C.)

v.

ATLANTIC CITY ELECTRIC COMPANY, a corporation of the State of New Jersey (3d-pty. deft. in D. C.)

Appellant.

(D. C. Civil No. 74-1097)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 14, 1976

Appendix A

Before SEITZ, *Chief Judge*, ALDISERT and GIBBONS, *Circuit Judges.*

PER CURIAM.

The question raised on this interlocutory appeal is whether plaintiffs may assert a state-law claim against Atlantic City Electric Company, a third-party defendant, when plaintiffs and Atlantic City are all citizens of New Jersey. On the basis of our precedents, we conclude that they may not. *E.g., Rosario* v. *American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227 (3d Cir. 1976); *Patton* v. *Baltimore & Ohio R. R. Co.*, 197 F.2d 732 (3d Cir. 1952).

The order allowing plaintiffs to amend their complaint to include Atlantic City as an original party defendant will be reversed.

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-185

MARY L. JOHNSON, Administratix ad Prosequendum and General Administratrix of the Estate of LEROY JOHNSON, deceased and LORETTA JOHNSON, Administratrix ad Prosequendum and General Administratrix of the Estate of HERBERT D. JOHNSON, deceased

v.

BETTER MATERIALS CORPORATION (Deft., 3d-pty. pltf. in D. C.)

v.

ATLANTIC CITY ELECTRIC COMPANY, a corporation of the State of New Jersey (3d-pty. deft. in D. C.)

Appellant.

(D. C. Civil No. 74-1097)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix B

Present: SEITZ, *Chief Judge* and ALDISERT and GIBBONS, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 1, 1975, be, and the same is hereby reversed. Costs taxed against the appellees.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

November 23, 1976

APPENDIX C

Opinion of the United States District Court for the District of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 74-1097

MARY L. JOHNSON, Administratrix ad prosequendum and General Administratrix of the ESTATE OF LEROY JOHNSON, and LORETTA JOHNSON, Administratrix ad prosequendum and General Administratrix of the ESTATE OF HERBERT JOHNSON, Deceased,

Plaintiffs,

v.

BETTER MATERIALS CORPORATION,

Defendant and
Third Party Plaintiff,

v.

ATLANTIC CITY ELECTRIC COMPANY, a Corporation of the State of New Jersey,

Third Party Defendant.

Appendix C

Appearances:

SHAPIRO, EISENSTAT, CAPIZOLA, O'NEILL, LISITSKI & GABAGE, PA.
By: GERALD M. EISENSTAT, Esquire
Vineland, New Jersey
Attorneys for Plaintiffs

LLOYD, MEGARGEE, STEEDLE & CONNOR, Esquires
By: JAMES E. FRANKLIN, II, Esquire
Pleasantville, New Jersey
Attorneys for Third Party Defendant Atlantic City Electric Company

KISSELMAN, DEVINE, MONTANO & SUMMERS, Esquires
By: RICHARD HIRSHORN, Esquire
Camden, New Jersey
Attorneys for Defendant Better Materials Corporation

COHEN, Senior Judge:

This matter is now before the court on a motion by Atlantic City Electric Co. (hereinafter ACI) to amend the order entered on October 3, 1975 to include a statement pursuant to 28 U.S.C. § 1292(b).[1] The order of

[1] 28 U.S.C. § 1292 (b) provides in relevant part:

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substanial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: . . ."

Appendix C

October 3, 1975 permitted plaintiffs to amend their complaint to name third party defendant, ACE, as a direct defendant.

This wrongful death, personal injury action was brought by the representatives of Leroy Johnson and Herbert D. Johnson. The jurisdiction of this court was based upon diversity of citizenship, 28 U.S.C. § 1332. Plaintiffs and ACE are citizens of New Jersey. Defendant Better Materials is a Pennsylvania corporation. ACE's opposition to the amended complaint was grounded on the theory that "complete diversity" would be destroyed, thereby defeating the jurisdiction of this court. This court permitted the amendment to the complaint, mindful of the fact that the federal courts were split on the question presented.[2] As has been concended by the commentators, the great weight of authority requires that any direct claim by a plaintiff against a third party must have an independent jurisdictional basis. Professor Moore, however, has sharply criticized this position, and called for a reexamination of the majority rule in light of *United Mine Workers* v. *Gibbs,* 383 U. S. 715 (1966). 3 Moore's Federal Practice, para. 14.27[1] (2 ed. 1974). Some of the more recent cases have embraced Professor Moore's position. *See Fawvor* v. *Texaco,* 387 F.Supp. 626 (E.D. Tex. 1975).

A § 1292(b) certification may be granted in the exercise of a district court's discretion if the three statutory criteria are met:

[2] The question of whether a plaintiff may assert a direct claim against a non-diverse third party defendant has been the subject of much critical commentary. *See, e.g.,* 6 Wright and Miller *Federal Practices and Procedure,* § 1444, 229-232 (1971); 3 Moore's Federal Practice, para. 14.27[1] (2d ed. 1974).

> The order must (1) involve a "controlling question of law," (2) offer "substantial ground for difference of opinion" as to its correctness, and (3) if appealed immediately "materially advance the ultimate termination of the litigation." *Katz* v. *Carte Blanche Corporation,* 496 F.2d 747, 754 (3rd Cir. 1974).

Since the issue presented here involves the subject matter jurisdiction of this court, there is little doubt that there exists a "controlling question of law" within the meaning of the statute. Reversals of a judgment on jurisdictional grounds after trial are to be avoided. *Katz* v. *Carte Blanche Corporation, supra,* at 755. As to the second criterion, given the recent trend expanding the jurisdiction of federal courts, and the fact that the Third Circuit has not addressed this question in recent years,[3] this court concludes that there is a "substantial ground for difference of opinion" as to the correctness of the order of October 3, 1975.

Lastly, it must be determined whether an immediate appeal from the order would "materially advance the ul-

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[3] The last time the Third Circuit appears to have addressed this question was in *Patton* v. *Baltimore & O. R. Co.*, 197 F.2d 732 (3rd Cir. 1952). This circuit has, however, taken a liberal view of jurisdiction in similar cases In *Jacobsen* v. *Atlantic City Hospital,* 392 F.2d 149, 153 (3rd Cir. 1968), the court pointed out:

> In recent years this court has taken the lead in recognizing diversity jurisdiction over an entire lawsuit in tort cases presenting closely related claims based, in principal part at least, on the same operative facts and normally litigated together, even though one of the claims, if litigated alone, would not satisfy a requirement of diversity jurisdiction.

timate termination of the litigation." It is argued that ACE will remain in this lawsuit as a third party defendant irrespective of whether it is ultimately decided that it cannot be named as a direct defendant. While this is true, if the question is decided in favor of ACE on appeal, then its exposure at trial will be limited to the risk of derivative liability.[4] This would simplify the issues at trial, and reduce jury confusion. Rather than try the case in its current posture, and have an appeal taken after trial on the jurisdictional issue, it makes more sense to resolve that issue before trial. For this reason, the court holds that an immediate appeal would "materially advance the ultimate termination of the litigation," and the application for a § 1292(b) certification is granted.

Counsel may submit an appropriate order amending the order of October 3, 1975.

MITCHELL H. COHEN
Senior Judge
United States District Court

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[4] *See F. R. Civ. P.* 14(a).